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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBERT TERM, 1977

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NO. 77-951

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OSCAR S. SAVAGE, M.J. ESTELLE, JR.,
AND BILLY G. MCMILLAN,
Petitioners

V.

ENRIQUE CARRERA LERMA,
Respondent

* * *

On Petition For A Writ of Certiorari
To The Supreme Court of the United States

* * *

BRIEF IN OPPOSITION

* * *

ENRIQUE CARRERA LERMA
TDC # 230807
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Respondent Pro Se

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IN THE SUPREME COURT OF THE UNITED STATES

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On Petition For A Writ Of Certiorari
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BRIEF IN OPPOSITION

TO THE HONORABLE JUDGES OF SAID COURT:

Now Comes ENRIQUE CARRERA LERMA, Respondent pro se herein, and files this, his Brief in Opposition.

OPINION BELOW

Petitioners are complaining of the Decision of the United States Court of Appeals for the Fifth Circuit in Cause No. 77-1639 wherein Respondent's cause was remanded and vacated to the district court. Petitioners' petition for rehearing en banc was denied.

JURISDICTION

Petitioners have not met the discretionary jurisdictional requirements of 28 U.S.C. Section 1254.

QUESTION PRESENTED

Whether the United States Court of Appeals Correctly Held That Respondent's Complaint that he was transferred from One Prison Unit Of The Texas Department of Corrections to Another In Retaliation For His Legal Activit-

STATEMENT OF THE CASE

Respondent, an inmate in the Texas Department of Corrections ("TDC"), filed his pro se complaint under 42 USC Section 1983 against Petitioners, Oscar S. Savage, W.J. Estelle, and Billy G. McMillan, in which he alleges that he was summarily transferred, without notice or hearing, from a medium security prison to the TDC's only maximum security unit as punishment for testifying before a committee of the Texas Legislature regarding prison brutality and for filing and assisting other prisoners in filing actions in federal court critical to TDC and acts of prison officials at the medium security facility.

The United States Court for the Southern District of Texas, Houston Division, summarily dismissed the complaint for failure to state a claim upon which relief could be granted. No evidence whatsoever was heard.

Respondent gave timely notice of appeal to the United States Court of Appeals for the Fifth Circuit, which was granted. Following submission of briefs, the United States Court of Appeals for the Fifth Circuit vacated and remanded Respondent's cause to the district court for a full ventilation of the facts and consideration of the issues tendered. Petitioners' petition for rehearing en banc was denied.

ARGUMENT AND AUTHORTIES

THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT'S ASSERTIONS THAT HE WAS TRANSFERRED IN RETRIBUTION FOR TESTIFYING BEFORE A LEGISLATIVE COMMITTEE AND FOR HIS LEGAL ACTIVITIES ON BEHALF OF HIMSELF AND OTHER INMATES DID STATE A CLAIM UPON RELIEF COULD BE GRANTED.

Even at this stage of these proceedings, it is still necessary to point out that Respondent Lerma has received no trial, there has been no evidentiary hearing of any kind. However, it would appear that the district court has either overlooked these facts or has begun a retreat from the standards of Haines v. Kerner, 404 U.S. 519(1972).

When ruling on a motion to dismiss a complaint under FED.R.CIV.P. 12(b), a court must accept the allegations of the complaint as true. Cooper v. Pate, 378 U.S. 546(1964). Petitioners, for example, argue that although Respondent alleges that he was transferred in retaliation for his legal activities, he fails to implied that he was denied access to

the Courts. This position must rejected. The mere allegation by Respondent that he was punished by Petitioners for assisting other inmates in filing actions in federal court critical to TDC, violated his constitutional right "to serve as "jailhouse lawyer" and to have access to the courts". See Wolff v. McDonald, 418 U.S. 539(1974); Andrade v. Hauck, 542 F.2d 1071(5th Cir.1971); Corpus v. Estellee, 551 F.2d 68(1977). Such an allegation, if proved, would certainly be an appropriate justification for equity relief since Respondent Lerma's access to the courts is not to be curtailed or restricted by threats, intimidation, coercion or punishment. Novak v. Beto, 5th Cir. 1971, 453 F.2d 661, 665 (1972); Johnson v. Avery, 1968, 393 U.S. 483; Bread v. Alabama Bd. of Corrections, 5th Cir. 1969, 413 F.2d 455; Younger v. Gilmore, 404 U.S. 15 (1971).

Additional requirements are stated in Haines v. Kerner, supra, which requires that courts hold a pro se complaint to a less stringent than formal pleadings drafted by a lawyer, and in Lucarell v. McNair, 435 F.2d 836(6th Cir.1972), which requires that appellate courts should scrutinize dismissal of civil rights actions with special care. Justice Stevens' dissent points out how the Supreme Court should deal with pro se complaints so as not to retreat from Haines. Should the Supreme Court deny Respondent's brief in opposition, represents a far more serious step backwards.

As previously mentioned, Respondent Lerma has never been allowed any kind of an evidentiary hearing whatsoever. Therefore, if the complaint is read with the liberality required by Haines and the scruting required by Lucarell, it becomes clear that Lerma has alleged a cause of action against Petitioners because "the transfer in the instant case may implicate First Amendment rights. see Montanye v. Hayes, 427 U.S. 236,_____,96 S.Ct. 2543, 2548(Stevens,J., Dissenting), as well as the right of prisoners to serve as "jailhouse lawyers" and to have access to the federal courts. See Wolff v. McDonald, 418 U.S. 539(1974) Andrade v. Hauck, 542 F.2d 1071(5th Cir.1971); Corpus v. Estelle, 551 F.2d 68(5th Cir.1977).

Petitioners further argue that "prison administrators are the individuals best qualified through experience and education to make the difficult decisions regarding institutional placements." For this reason, they claim, wide-ranging defernce must be accorded the decisions of prison administrators. While this claim, is, to some degree correct, Respondent would like to point out to this Honorable Court and there is no iron curtain drawn between the Constitution and the prisons of this country. Prisoners have been held to enjoy substantial rights under the First and Fourteenth Amendments. Cruz v. Beto, 405 U.S. 319(1972); Cooper v. Pate, 378 U.S. 546(1964). He retains his right of access to the Courts. Younger v. Gilmore, 404 U.S. 15(1971); Johnson v. Avery, 393 U.S. 483(1968); Ex parte Hull, 312 U.S. 546(1941). Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. Lee v. Washington, 390 U.S. 333(1968). The prisoners may also claim the protections of the Due Process Clause. He may not be deprived of his life, liberty or property without due process of law. Haines v. Kerner, 404 U.S. 519 (1972); Wilwording v. Swenson, 404 U.S. 249(1971); Screws v. United States, 325 U.S. 91 (1945).

In this respect, a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights. Johnson v. Avery, 393 U.S. 483, 486(1969). This is such a case. Therefore, to allow prison administrators to determine the constitutional rights of a convicted person would be to the abdicate to this Honorable Court's responsibilities. Johnson v. Avery, supra, Sobell v. Reed(1971), 327 F.Supp 1294, 1302. After all, the maintenance of a correctional system is state action. "Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons' which include prisoners." Cruz v. Beto, 405 319, 321(1972). Moreover, during the past few years, due largely to the courage of young poverty lawyers, the soul-chilling inhumanity of conditions in American prisons has been

thrust upon the judicial conssience. The traditional "hands-off" doctine has yielded to the broader principle stated by Judge Murrah in Stapleton v. Mitchell, D. Kan. 1945, 60 F.Supp. 51, 55, "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication,.." Haines v. Kerner, 1972, 404 U.S. 519 and Cruz v. Beto, 1972, 405 U.S. 319. It is almost impossible to say anything about the national shame of TDC that has not been said before, and Respondent will not try at this time. See Cruz et al vs. Beto & Estelle, C.A.No. 71-H-1371; Guajardo v. Estelle, C.A.No. 71-H-570(Memorandum and Order dated April 22nd, 1977).

The theory is advanced that the Court of Appeals' decision"opens all prison transfer decision to attack in the federal courts.." and "can force prison officials to undertake the expensive and time-consuming of justifying to a federal court a decision to transfer the inmate." Respondent think that any prisoner be properly compensated for the suffering he had to endure, and recovery should not be defeated by an attempt by prison administrators to claim that prisoners have no constitutional rights when there is reason to believe that they are "experienced and educated" and when responsibility for permitting acts contrary to the Constitution to exist was ultimately, in any event, squarely theirs. Thus, the Court should not be moved by the suggestion that if the Court of Appeals decision is affirmed will affect the Petitioners in the manner described above. Had Petitioners respected the constiutional rights of Respondent Lerma, this lawsuit wouldn't have been brought against them. Moreover, in accordance to Final Report Of Joint Committee On Prison Reform, 63rd Legislature December 1974, evidence was found that numerous of TDC officials did not meet the educational requirement for employment in TDC and that 29% of the TDC officials were not in compliance with the educational requirement as in the case of Petitioners. Yet they claim to be the "best individuals qualified through experience and education..." to make decisions.

While it might be true, as Petitioner claim, that in 1976, there were 5,346 transfers of inmates among the units of TDC. Even assuming arguendo that this claim is true, Respondent Lerma asserts that 99% of this transfers were requested by the inmate concern to the unit's warden which in return the warden recommended transfer of the inmate to TDC 's Classification Committee to which Petitioner McMillan as the Director, approved such transfers. This is TDC policy. And should the Petitioners be subject to five thousand additional suits and unjustified burden is irrelevant. In the first place, constitutional rights are not measure by the dollar. Recent decisions of the United States Supreme Court, as well as of several courts of appeals, clearly establish that cursory deposition of meritless claims by prisoners no longer suffices. In evaluating a prisoner's suit, the Wisconsin Supreme Court stated: "The courts cannot upon a hands-off doctrine exercise 'abstention' when the constitutionality of the administration's act is at issue." State ex rel. Thomas v. State, 55 Wis.2d 343, 357, 198 (N.W.2d 675, 683(1972).

Respondent alleges for the reasons tendered, he has raised issues not clearly foreclosed by Meachum v. Fano, 427 U.S. 215(1976); Montanye v. Haymes, 427 U.S. 236(1976).

Moreover, Respondent Lerma has a liberty interest rooted in state law not to be punished absent specified procedures. Those procedures are set forth in Texas statutes and TDC Rules and Regulations. More important to this case, TDC rules create a reasonable expectation that it is prudent to use only as much punishment as will effect the necessary change in the individual's behavior. The relevant procedure is set out in TDC rules 4.2.5., which is entitled "Findings and Dispositions". That section specifically prohibits a punitive transfer as a form of punishment. Therefore, Respondent Lerma has several reasonable expections rooted in state law, relating to his punitive transfer not authorized by TDC rules and Texas Statutes. He is entitled to receive notice and a hearing contemporaneous to the disposition of any punishment or with a reasonable period thereafter. TDC rule 4.2.3. Therefore, this Court must protect those liberty interests with the provisions of the Due Process Clause.

If the decision of this Court is adverse to Respondent Lerma, it will have the effect of giving prison guards the right to decide whether a prisoner can serve as a "Jailhouse lawyer"; it will allow prison officials to ignor prisoners' constitutional right of access to the courts; and it will allow prison officials' relatiatory schemes and summiarly transfers merely because prisoners chose to exercise their fundamental constitutional rights of access to the courts. These tragic affects can be avioded only by returning this case to the district court so that it can be properly developed. All Respondent Lerma asks is for an oppuntunity to present his evilence before a trier of facts. The Fifth Circuit's decision does not conflict with the Court's decision in this case and with the cases cited herein.

CONCLUSION

For all the foregoing reasons, Respondent respectfully prays that this their Petition for Writ of Certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Enrique Carrera Lerma, Respondent Pro Se, certify that a true and correct of the above and foregoing Brief In Opposition has been served, via United States Mail, postage prepaid upon:

Ms. Richel Rivers
Assistant Attorney General
P.O. Box 12548, Capitol Station
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this the 17th day of JANUARY, 1978.

E. C. Lerma

ENRIQUE CARRERA LERMA